FILE COPY

IN THE

Supreme Court of the United States

October Term, 1946

No. 1239

S. L. HURT,

Petitioner

versus

COTTON STATES FERTILIZER COMPANY, *et. al.*,
(District Court No. 301)

Respondents

S. L. HURT,

Petitioner

versus

COTTON STATES FERTILIZER COMPANY, *et. al.*,
(District Court No. 316)

Respondents

S. L. HURT,

Petitioner

versus

FRAMPTON E. ELLIS, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, *et. al.*,

Respondents

(District Court No. 324)

RESPONSE OF THE RESPONDENTS IN DISTRICT COURT CASE NO. 324 TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEO. P. WHITMAN
Attorney For Named Respondents.

CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

October Term, 1946

No. 1239

S. L. HURT,

Petitioner

versus

COTTON STATES FERTILIZER COMPANY, *et. al.*,

Respondents

(District Court No. 301)

S. L. HURT,

Petitioner

versus

COTTON STATES FERTILIZER COMPANY, *et. al.*,

Respondents

(District Court No. 316)

S. L. HURT,

Petitioner

versus

FRAMPTON E. ELLIS, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, *et. al.*,

Respondents

(District Court No. 324)

RESPONSE OF FRAMPTON E. ELLIS AS ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF THE ESTATE OF JOEL HURT, SR., DECEASED, AND MRS. WILLIE MARTIN HURT, DISTRICT COURT CASE NO. 324.

The nature and object of this case cannot better be succinctly stated than as set forth in the opinion of the Circuit Court of Appeals (159 F. 2d. 52, 55, R. 2591, v. V). S. L. Hurt, petitioner for writ of certiorari, states (page 2 of petition) that the suit was against him, and for the determination, *inter alia*, that Willie Martin Hurt is a creditor of the estate in question "to such an amount that petitioner has no equity in the said shares (of preferred stock) and is, therefore, without status to sue." Case No. 324 was not against S. L. Hurt alone, but was also against Virginia L. Hurt and Cotton States Fertilizer Company, as indicated in the opinion of the Court of Appeals; nor did it seek the determination of the question of the right of S. L. Hurt to sue in Case No. 301, or otherwise, in respect to the subject-matter of that case, which was a stockholders' derivative action relating to the affairs of Cotton States Fertilizer Company. Plaintiffs in Case No. 324, respondents here, were not parties to Cases Nos. 301 or 316.

At page 7 of the petition for writ of certiorari it is stated: "Thereupon, on December 10, 1943, the *petitioner* (S. L. Hurt) bought the 495.1 shares of preferred stock from the estate *****. **** On April 20, 1944 the petitioner made demand upon Cotton States to transfer the 495.1 shares of preferred stock *into his own name* as record owner, but Cotton States refused." As a matter of fact, the alleged sale of the stock was by Joel Hurt, Jr., as executor of the estate to his wife, Mrs. Joel Hurt, Jr. (Virginia Lipscomb Hurt) and to his brother, S. L. Hurt (R. 164, v. I; R. 2, v. I), and not to S. L. Hurt alone; and the demand for the transfer of the stock was that it be transferred to S. L. Hurt and Virginia Lipscomb Hurt (R. 75, 76, v. I). The alleged sale was set aside by the District Judge as fraudulent and void; the judgment of the District Court was affirmed by the Circuit Court of Appeals, and no complaint of the judgment in that respect is made here. Case No. 324 thus accomplished its object; that of having the stock placed back where it belongs, in the Estate of Joel Hurt, Sr., deceased, as an asset for proper administration by the present personal representative of the estate, Frampton E. Ellis, as administrator de bonis non cum testamento annexo of said estate (159 F. 2d. 52, 56, 60; R. 2600, v. V).

The petition for writ of certiorari as to Case No. 324 presents the single question (pp. 4, 5):

"3. Whether, in such suit (a diversity jurisdiction suit), the Federal Courts in Georgia were free to decide without reference to Georgia law that a financial agreement between husband and wife, residents of Georgia, by virtue of which the wife, who did not want a divorce, took such steps and proceedings that she got one, is valid, and that the executory portion of such agreement is enforcible?"

The specification of error raises the same legal question (pp. 19, 28).

The argument of petitioner appears to be predicated on what he claims are three controlling facts, two of which he says are not open to dispute, and the other of which he says is an inference compellingly required by the first two. The argument is in the nature of a syllogism. It is respectfully insisted by respondents that the premises are incorrect and not supported by the record, and that the conclusion is erroneous and unsound.

The District Court found as a matter of fact that the guaranty of Joel Hurt, Sr. was not given for the purpose of facilitating a divorce and that the alimony agreement and said guaranty was not entered into in contemplation of a divorce. (R. 2539, v. V). The Circuit Court of Appeals, in its opinion and judgment of affirmance, said in respect of this finding: "As to No. 324, appellants attack the findings and judgment upon the ground **** (2) that Mrs. Willie Martin Hurt was a creditor of the estate. *** The second (attack) is based mainly on the position that the claim of Mrs. Hurt to a debt is based upon an illegal agreement because made to promote the procurement of a divorce." (159 F. 2d. 52, 56; R. 2593, v. V). *** "As to Mrs. Hurt's claim against the estate, we think it quite clear that the record supports the finding of the District Judge that she had a substantial claim against the estate *which is valid* (underscoring ours) and unpaid for an amount considerably in excess of the present value of the certificate (of stock) in controversy (159 F. 2d. 52, 60; R. 2601, v. V.) The judgment of the Circuit Court of Appeals was rendered on January 3, 1947. The petitioner here filed in that Court on January 21, 1947, petition for rehearing, claiming, inter alia, that "In Case No. 324, the Court overlooked and failed to consider that the record of the divorce proceedings filed in evidence in this case shows conclusively that the Guar-

anty (upon which Mrs. Willie Martin Hurt bases her claim to be a creditor of the estate of Joel Hurt, Sr., deceased), was given for the purpose of facilitating and promoting a divorce, and therefore void ab initio, under the universal rule of law laid down in 17 Am. Juris., page 156, Sec. 14 and approved in Georgia, in the case of *Birch vs. Anthony*, 109 Ga. 349, 34 S.E. 561, 77 Am. St. Rep. 379, which holds that any agreement even 'intended' or 'calculated' to facilitate the obtaining of a divorce is absolutely void." The Circuit Court of Appeals denied the motion for rehearing on January 31, 1947 (R. 2611, v. V).

The same question thus passed on, reviewed and re-reviewed, is now here.

On December 13, 1921 Geo. F. Hurt filed suit for divorce against his wife, Willie Martin Hurt, on the ground of cruel treatment. To this suit Mrs. Hurt on December 19, 1921, filed her answer and cross-bill for divorce, seeking therein a divorce and temporary and permanent alimony for the support of herself and children and the allowance of counsel fees. She filed an amendment to said answer and cross-bill on January 12, 1922. R. 2517, et. se. v. V). Thereafter by alimony agreement signed by Mr. and Mrs. Hurt, bearing date October 28, 1922, and guaranty agreement signed by Joel Hurt, Sr. bearing date November 2, 1922, which instruments constituted a single transaction, the matter of alimony and counsel fees was settled between the parties. The alimony agreement and guaranty are set forth at pages 1523, et seq. of v. III of Record. According to the undisputed testimony of John M. Slaton (a former Governor of Georgia, R. 2149, v. V) who was the attorney at law for Mrs. Hurt, and as such represented her in negotiations which resulted in said agreement and guaranty, this document was prepared by one Clifford L. Anderson (since deceased), as the attorney at law for George F. Hurt (also since deceased), then the husband of Mrs. Hurt, and for Joel Hurt, Sr. (R. 2147 et. seq., 2154 v. V).

The alimony agreement recites that George F. Hurt was a resident of Fulton County, Georgia "but temporarily sojourning in the City of New York and State of New York." It recites that George F. Hurt and his wife were married November 2, 1898 "but they had been living in a state of separation for several years." It names their three children, Edmund W.

Hurt, who had reached his majority in April, 1922, and Sarah Bright Hurt and Joel Hurt, III., still minors. The agreement further recites that Mr. Hurt is indebted to Mrs. Hurt in the sum of Five Thousand ($5,000.00) Dollars, principal and interest, arising on a certain note made by him to her, and upon other obligations, and is also indebted to her and the children for certain monthly allowances "heretofore agreed to be made by him, which he has failed to pay;" and they "desire to adjust all financial matters between them and desire likewise to enter into an agreement providing for the support of Mrs. Hurt and the minor children in the future, the same to be in lieu of all right to alimony for her and their account."

By the agreement Mr. Hurt was obligated to pay Mrs. Hurt the Five Thousand ($5,000.00) Dollar item in payment of the obligations due by him to her; also to pay to her "all back allowances made for the support of herself and the two minor children amounting to Eight Thousand, Four Hundred Sixty ($8,460.00) Dollars" (which was based on allowances of Four Hundred Seventy ($470.00) Dollars per month), "heretofore agreed to be paid to Mrs. Hurt for herself and two minor children," giving credit for certain advances theretofore made to Mrs. Hurt by Mrs. Joel Hurt, Sr. amounting to Five Thousand, Nine Hundred Thirty ($5,930.00) Dollars, leaving a balance to be paid by Mr. Hurt to Mrs. Hurt of Two Thousand, Five Hundred Thirty ($2,530.00) Dollars. By the agreement Mr. Hurt also agreed to pay to his son, Edmund W. Hurt, who had arrived at his majority, One Thousand, Nine Hundred Sixty ($1,960.00) Dollars, representing arrearages at the rate of One Hundred Forty ($140.00) Dollars per month in allowances to him.

By the agreement Mr. Hurt was obligated to pay Mrs. Hurt Five Hundred ($500.00) Dollars per month beginning November 1, 1922, for the support of herself and her two minor children, subject to abatement to the extent of One Hundred Fifty ($150.00) Dollars per month in relation to each of the two children upon the happening of the events therein set forth in respect of said children; and completely as to Mrs. Hurt upon her death or earlier remarriage.

It is undisputed that Mrs. Hurt has never remarried. She so testified. R. 2256, v. V.

Paragraph seven (7) of the agreement is as follows: "This agreement is made upon the further consideration that the payment of the sums of money herein agreed to be paid by Mr. Hurt shall be guaranteed by Mr. Joel Hurt, Sr. and this paper shall not become effectual until such guaranty is made;" etc.

The guaranty by its language affords internal evidence that it was a part of the same transaction as the alimony agreement and made in connection therewith and as a part thereof even though it actually bears date five days thereafter. By the guaranty Joel Hurt guarantees the payment of all sums of money herein agreed to be paid by George F. Hurt to Mrs. Willie Martin Hurt promptly at the time stated in the foregoing agreement. The guaranty also provides that it is made "in consideration that the said Mrs. Willie Martin Hurt has entered into the foregoing agreement with my son, George F. Hurt." And, as stated above, by paragraph seven (7) thereof, the agreement between Mr. and Mrs. Hurt was made upon the further consideration that the payment of the sums of money therein agreed to be paid by Mr. Hurt should be guaranteed by Mr. Joel Hurt, Sr. and would not become effectual until such guaranty was made. The difference in the dates of the alimony agreement and the guaranty is doubtless explained by the fact that George F. Hurt was at the time in New York and the agreement had been sent there for his signature; R. 2404, 2405, v. V. That the alimony agreement and the guaranty were parts of a single transaction is supported by the testimony of Mr. Slaton. They constituted a single document and were delivered at the same time; there was no negotiation in respect of the matter at all between the parties between the dates October 28, 1922 and November 2, 1922. (R. 2158, 2159, v. V.)

It was contended by counsel for S. L. Hurt and Virginia L. Hurt in the District Court that the guaranty was void ab initio because it was given without a valid, legal and legitimate consideration, and because it was given under duress and threats of Mrs. Hurt exercised upon Joel Hurt, Sr. in his life time. R. 2128, v. V. The District Court in its finding of fact No. 9, above mentioned, found to the contrary of these contentions; in other words, the Court found that the guaranty was not executed by Joel Hurt, Sr. under duress and threats of Mrs. Hurt; that it was not given for the purpose of facilitating a

divorce and that the alimony agreement and guaranty were not entered into in contemplation of a divorce. R. 2539, v. V. The question of the validity of the guaranty as procured by alleged threats and duress is not involved here. It was disposed of in the District Court and not thereafter urged.

It is respectfully submitted that this finding is fully supported, if not demanded, by the evidence. Mrs. Hurt's testimony is set forth at pages 2255 to 2269 and pages 2401 to 2410 of the record, volume V. She testified that the matter of the negotiation of the alimony agreement and guaranty was handled entirely by her attorneys, her father, the late Edmund W. Martin, and Mr. John M. Slaton, and that she personally had no contacts or communication with her husband, George F. Hurt, or with Mr. Joel Hurt, Sr. in relation thereto. She further testified that she never saw Mr. Hurt, Sr. nor Mrs. Joel Hurt, Sr. while the divorce suit was pending, with the exception that on one occasion during said period she went to the home of Mr. and Mrs. Joel Hurt, Sr., at the request of Mrs. Joel Hurt, Sr., at the time of a bereavement in the family. (R. 2258, 2259, 2260, 2261, 2264, 2268, 2403, 2040, v. V.). Mr. Slaton's testimony is set forth at pages 2147 to 2177 of the record, Volume V. In respect of Mrs. Willie Martin Hurt, he testified: "Mrs. Hurt was a great-granddaughter of Chief Justice Hiram Warner, and her Uncle was Chief Justice of the Supreme Court of Georgia, Hiram Warner Hill." (R. 2153, v. V). "I have known that lady all her life. She is gentle and kind, forgiving and indulgent. She had the high sense of honor and preservation of her own reputation." (R. 2172, v. V). He further testified, as did Mrs. Hurt, that he personally and professionally advised Mrs. Hurt that she should not see or have any dealings or associations with members of the family or Mr. and Mrs. Joel Hurt, Sr. pending the divorce proceedings. (R. 2159, 2160, v. V). In respect of the question or divorce and removal of disabilities, Mrs. Hurt testified that she never at any time discussed with her husband the question of a divorce nor agree that her husband might secure a divorce from her; nor did she have any discussion about such matter with her husband's father, Mr. Joel Hurt, Sr.; that she never discussed with either of them the question of removal of disabilities. (R. 2261, v. V). Mr. Slaton testified that he did not make any agreement on behalf of Mrs. Willie Martin Hurt, or even intimate or suggest any agreement on her behalf, that her

husband, Mr. George F. Hurt, should have a divorce by consent; that in the representation of Mrs. Hurt he did not ask or have an agreement with Mr. Clifford L. Anderson (the attorney for George F. Hurt and Joel Hurt, Sr.), or with any one else under the terms of which it was understood or agreed that Mrs. Hurt should have a divorce; that it was a matter to be submitted to the Court and to the jury, and "there was no thought of that sort;" that there was no agreement that the divorce proceeding on behalf of Mrs. Hurt was to be undefended; that there was no agreement by him, Mr. Slaton, or by his law firm, or any one else on behalf of Mrs. Willie Martin Hurt, that Mr. George F. Hurt should not defend against Mrs. Hurt's cross-bill based on desertion; that with respect to the matter of the removal of disabilities, that is entirely a matter for the jury. (R. 2154, 2155, 2156, 2162, 2175, v. V).

It is respectfully submitted that the testimony of Mrs. Hurt and Mr. Slaton shows conclusively that the divorce granted to Mrs. Hurt was without collusion or consent and was legally obtained. Indeed, the divorce granted to Mrs. Hurt was not and is not attacked. The then counsel for petitioner here stated on the trial that it was not being attacked. (R. 2262, v. V). Mrs. Hurt had sufficient legal grounds for divorce, and even though she had not thought about divorce before she was sued by her husband for divorce on unfounded charges against her, she did thereafter desire a divorce, and, as stated, had legal grounds for proceedings to that end. And this brings us to the statement of petitioner here in his petition for writ of certiorari, that "Mrs. Willie Martin Hurt did not want a divorce," and claimed by petitioner to be a controlling fact, not open to dispute. Petition for writ, page 28. See also pages 4 and 18. Petitioner appears to base this statement on the Record, page 2262, v. V. This does not appear to be a correct interpretation of the record. Mrs. Willie Martin Hurt did not testify that she did not want a divorce. The first question asked her on cross-examination by Mr. Durant, counsel for S. L. Hurt and Virginia L. Hurt in the District Court, was: "Q. Mrs. Hurt, you did not particularly want a divorce yourself, did you? A. Well, I hadn't thought about it, Mr. Durant." (R. 2262, v. V). It will be noted that this question did not relate itself to any particular time. Then follow in the record certain statements by counsel for plaintiffs in that

Court (respondents here), the District Judge, and counsel for said S. L. Hurt and Virginia L. Hurt, and among other things the Court asked of counsel for said Hurts the question and received the answer following: "The Court: What was it you asked her? Mr. Durant: I stated, you did not particularly want a divorce, and she said no, I never even thought of it." This answer purporting to state what Mrs. Hurt had testified is not the language of the record as to her testimony, introducing as it did the word "no," a word Mrs. Willie Martin Hurt did not use. This testimony was given on the afternoon of May 8, 1945 (R. 2251, v. V). Two days thereafter (R. 2378, v. V), when Mrs. Hurt was recalled as a witness, she testified further in respect of this matter, at which time counsel for her and Ellis, as administrator (counsel for them as respondents here) undertook to have the witness clarify the statement previously made by her in order to relate it to the time she had in mind in making it; and it must be confessed that said counsel, after two days had elapsed, was faulty in his recollection as to what her previous answer had been insofar as the use of the word "no" was concerned and thus used it in his introductory statement, as a word of recollection only, to the question he propounded. In answer to the question as to the time to which her previous statement related, she then testified: "I never knew there was any reason for getting a divorce or that anybody was contemplating a divorce. Yes, I wanted a divorce after he brought a suit against me. Anybody that has any self-respect would have wanted one with that." (R. 2409, 2410, v. V). This attitude on the part of Mrs. Hurt, after her husband had brought the divorce suit against her, is supported by the testimony of Mr. Slaton. (R. 2153-2156, v. V).

Thus, the first premise, or so-called controlling fact, on which petitioner seeks writ of certiorari, falls.

The second alleged controlling fact, "that she (Mrs. Hurt) and her husband were at an impasse which threatened to make it impossible for him to get divorced," is not a statement of fact, but a mere conclusion; and there is nothing in the alimony agreement or guaranty which required or requires a holding that they were invalid.

Mrs. Hurt did not seek or require her husband's consent to her securing a divorce. Nor did she consent to the removal

of his disabilities or have any agreement in relation thereto. That was a matter which could be determined only by the jury on the rendition of the final verdict in her case, and that only in case of the grant of a divorce to her (Code of Georgia, Annotated, Section 30-122); and no verdict or judgment by default could have been taken or was taken in the proceeding by Mrs. Hurt for divorce. The allegations in support of her petition for divorce were established by evidence as required by law. (Code of Georgia Annotated, Section 30-113; R. 2404, 2414-2417, v. V).

In addition to the facts already mentioned, such as the conduct of negotiations exclusively between John M. Slaton and Edmund W. Martin (father of Mrs. Willie Martin Hurt, since deceased), the attorneys for Mrs. Hurt, and Clifford L. Anderson (also since deceased), the attorney for George F. Hurt and Joel Hurt, Sr., and the entire absence of an consent or collusion in respect of the securing of a divorce by Mrs. Hurt and in respect of the removal of disabilities as to Mr. George F. Hurt, and the entire absence of any understanding or agreement in relation to such matters, attention is also called to other facts in the record, — facts which are a matter of written record, which support the inescapable conclusion that the contention of petitioner here as to the invalidity of the guaranty is entirely without merit.

For example, the alimony agreement bears date October 28, 1922 and the guaranty November 2, 1922, but both parts of a single and contemporaneous transaction, as above indicated. The will of Mr. Joel Hurt, Sr. was executed on October 4, 1922 (R. 2110, 2118, v. V), some months after December 13, 1921, when the divorce suit of George F. Hurt against Willie Martin Hurt was filed (R. 2519, v. V), and while said suit was pending. By this will he bequeathed to Mrs. Willie Martin Hurt Forty (40) shares of the Capital Stock of the Continental Trust Company, and he also bequeathed one-half of one-sixth of the net income from the residue of his estate to his three grandchildren, the children of his son, George F. Hurt, and his wife, Mrs. Willie Martin Hurt.

By a codicil to that will executed by Mr. Joel Hurt, Sr. under date of August 15, 1924 (R. 2119, v. V), Mr. Hurt, Sr. not only did not change his original will, insofar as the bequest to Mrs. Willie Martin Hurt and her children were concerned, but

he revoked Item Ten (10) of his original will and substituted a provision in lieu thereof which evidently had reference to the guaranty in question, for in lieu of the word "assumed" in Item Ten (10) of his original will, he used in the substituted provision the words "assumed or guaranteed the payment of," etc.

The testator also made another codicil to his will under date of November 28, 1924 (R. 235, V. I), and by this codicil he made no change whatever in respect of the bequest to Mrs. Willie Martin Hurt and her children. Mr. Hurt died on January 9, 1926 and his will and codicil were probated in solemn form on April 23, 1926. R. 237, v. I.

The conduct of Mr. Joel Hurt, Jr. as an officer of the Continental Trust Company, one of the executors of his father's will, and of himself as one of the individual executors, also is a complete refutation of the contentions made for the first time, after a period of some twenty years had elapsed since the alimony agreement and guaranty were executed. Joel Hurt, Jr. testified that he knew of the existence of the alimony agreement and guaranty; that a duplicate or triplicate original thereof came into the possession of the executors and that he knew of the existence of the agreement and guaranty all through the intervening years, and remembered it when he claims to have disposed of the Certificate No. 5 of the Preferred Stock of the Cotton States Fertilizer Company on December 10, 1943. (R. 2201-2203, 2223, v. V).

The alimony agreement and guaranty were recognized as valid obligations by the Federal Estate Income Tax Return verified by the executors of the estate, including Joel Hurt, Jr., sworn to on February 23, 1927. Paragraphs 4, 4(a), 4(b) and 4(c) of the alimony agreement and the entire guaranty were set forth as Exhibits to Schedule "I" and in that Schedule the liability under the guaranty was estimated to be Forty-five Thousand ($45,000.00) Dollars. R. 2446, 2459-2463, v. V).

The alimony agreement and guaranty were also recognized by the original executors of the estate and also by S. L. Hurt, the petitioner here, by agreement of date June 19, 1926, and also by Suit No. 71193 in the Superior Court of Fulton County, Georgia, and the decrees therein (R. 2530, 2480, v. V), to

which agreement and suit they and Mrs. Willie Martin Hurt, and others, were parties.

Joel Hurt, Jr., former executor, recognized the obligation of the estate to Mrs. Willie Martin Hurt under the alimony agreement and guaranty by his letter, in evidence, of date June 21, 1935 to Mr. John M. Slaton. (R. 2105-2108, v. V).

Even if admissions both expressly and by silence and inaction are not technical estoppels, they are evidence and highly persuasive evidence against the belated suggestion of alleged invalidity of the alimony agreement and guaranty. Suit No. 71193 in Fulton Superior Court, and the decrees therein, are more than mere admissions; they are undoubtedly conclusive.

It is undisputed that George F. Hurt and his wife, Mrs. Willie Martin Hurt, had been living in a bona fide state of separation for a number of years before the divorce suit was brought. Mrs. Hurt so testified and that fact is confirmed by other testimony in the record. This fact also appears from the alimony agreement itself. It also appears from the testimony by deposition of Mrs. Hurt on which divorce was granted to her on the ground of desertion. She testified on the trial of this case and by depositions in the divorce case that her husband had deserted her against her consent for more than the legal period of three years.

While it is true that a contract between husband and wife made with the intention of promoting a dissolution of the marriage relation is contrary to public policy and void, a contract providing for the wife's maintenance, made after separation has taken place, is valid and enforceable.

Sumner vs. Sumner, 121 Ga. 1 (3), 5.

To the same effect, see *Watson vs. Burnley*, 150 Ga. 460, s. c. 25 Ga. Apps. 779 (involving suit against surety of such a contract);

Craig vs. Craig, 53 Ga. Apps. 632 (involving agreement for support of wife and minor child);

Wallace vs. Wallace, 61 Ga. Apps. 789 (involving agreement for support of wife during the pendency of the husband's divorce action against her):

Hayes vs. Hayes, 65 Ga. Aps. 222.

"Where a husband and wife were living in a state of separation and the wife was suing the husband for divorce and alimony, they could enter into a valid and enforceable contract settling the issue as to alimony."

Brown vs. Farkas, 195 Ga. 653.

In the case at bar the agreement was made not only for the support of Mrs. Hurt, but also of the two minor children, Sarah Bright Hurt and Joel Hurt, III. The law contemplates that such agreements may be made and that they are valid, binding and enforceable. Code of Georgia Annotated, Section 30-211.

In *Hayes vs. Hayes, supra*, the Court held (Headnote 1): "Where a husband and wife are living in a bona fide state of separation, a valid and binding agreement may be entered into between them by which the husband agrees to pay the wife stated monthly sums for her support, which she agrees to accept in settlement of 'all alimony, temporary or permanent, counsel fees, or interest that she has or may have in his estate, and any and all other claims that she has or may have against' the husband or his estate, where it is provided that such payments shall cease upon the marriage of the wife; and where the parties are subsequently divorced and there is no claim made in the divorce suit for alimony, and no mention is made of alimony in the final decree, the decree is not a bar to the right of the wife to the monthly payments provided for in the agreement."

In the Hayes case the contract released and discharged the husband "from any and all liability for her, wife's support, and for alimony, temporary or permanent, attorney's fees, in any action that might be brought either against or by the husband," but it did not provide that the parties would be divorced. Neither is it so provided in the alimony agreement in the case at bar, and the attorney's fee in the case at bar was payable regardless of the outcome of the divorce proceedings.

There was no legal inhibition preventing Mrs. Hurt from filing an amendment to her divorce suit adding the additional ground for desertion.

Zachry vs. Zachry, 141 Ga. 404 (amendment adding ground of cruel treatment to ground of desertion);

Phinizy vs. Phinizy, 154 Ga. 199 (amendment adding ground of cruel treatment to ground of desertion);

Newton vs. Newton, 196 Ga. 522 (amendment adding ground of adultry to ground of desertion.)

The case at bar is clearly distinguishable from the case of *Birch v. Anthony*, 109 Ga. 349, and similar cases cited by counsel for petitioner, wherein the alimony agreement expressly provided for the granting of a divorce or was conditioned upon or made express provision for consent thereto.

Thus in *Birch vs Anthony, supra*, the agreement contained the express condition: "Providing this is a divorce granted said Anthony by 1st of April, 1895;" the contract thereby providing, in effect, that it should be legal if a divorce should be granted to the husband on or before a fixed date. In *Ozmore vs. Ozmore*, 179 Ga. 339, the agreement provided, among other things: "The wife is to file suit for divorce against the husband, *which he agrees not to contest* and the husband agrees to pay counsel fees and costs in said case." In *Law vs. Law*, 186 Ga. 113, the agreement provided that either party "may at any time bring his or her action for divorce, and *the same will not be contested;* provided the proceeding is based upon some other lawful ground than that which will involve the character or chastity of either party to this agreement." In the case at bar there was no provision of this sort in the alimony agreement. The obligation to pay monthly installments provided for in Paragraph 4 of the alimony agreement (R. 1525, V. III) was in no way conditioned upon the outcome of any divorce proceedings; and the obligation in respect of payment of attorney's fees (paragraph 6 of the agreement) was not conditioned upon the termination of the divorce suit in any particular manner or upon any particular outcome thereof.

It is, therefore, respectfully submitted that the District Court's finding of fact No. 9, affirmed by the Circuit Court of Appeals, was and is correct. It is not clearly erroneous, but finds substantial support in the evidence, if, indeed, it is not demanded thereby. The applicable Georgia law was applied by the Court to the facts as they were actually and properly found by the Court.

The question here is not a question of law, based on undisputed facts, except as such facts, it may be fairly contended,

demanded the finding by the District Court; but rather, at most, a question of fact, in respect of which the District Court's finding must stand unless clearly erroneous; and the application of Georgia law to such fact, and not to an entirely different fact or facts. 159 F. 2d. 52, 56; Rule 52 (a) of the Rules of Civil Procedure for the District Courts of the United States. (28 U.S.C.A. foll. sec. 723 c, page 667).

The concluding statement of petitioner in his petition for writ of certiorari that "we do not go into the question whether Mr. Ellis was in the proper discharge of his duty as administrator," etc., is not pertinent here; and even if it were, it is apparently based on an erroneous view and unsound. Ellis was not a party to Case No. 301. He, as administrator, brought Suit No. 324 to set aside an alleged fradulent transfer of stock by the former executor, who had been removed at the instance of Mrs. Willie Martin Hurt, a creditor of the estate, to S. L. Hurt, the petitioner here, and Virginia Lipscomb Hurt, brother and wife respectively of the former executor. Mrs. Willie Martin Hurt joined as plaintiff in Suit No. 324, as at least a proper party. The District Court found that both Ellis as administrator, and Mrs. Willie Martin Hurt, had a right to bring this suit. R. 2547, v. V. S. L. Hurt as co-plaintiff with Virginia Lipscomb Hurt in Suit No. 301, and later as plaintiff alone (the case having after its institution been dismissed as to Virginia Lipscomb Hurt, R. 207, v. I), did not undertake to represent the estate in that case. He was relying on his claimed ownership of the stock as an alleged purchaser jointly with his sister-in-law from his brother at a time when the later was executor of the estate and before his removal; and without conceding the invalidity of the purchase, he also claimed to be the owner of an equitable interest in the stock as estate stock. He was proceeding in Case No. 301 in his own interest. He never contested the claim of Mrs. Willie Martin Hurt as a creditor until it came into conflict with his own personal interest, and that is the case now. The transfer of the stock to him and his sister-in-law was adjudicated as fradulent and void, and the stock is now back in the estate, where it belongs, as above indicated, to be administered by Ellis, as administrator. The greater the value the stock has or may have, as the result of Case No. 301 or otherwise, the larger the amount that will be available for the payment of the estate's indebtedness to Mrs.

Willie Martin Hurt, which is increasing monthly; and the brighter the prospect of S. L. Hurt, as an owner of an equitable interest therein as estate stock, to realize therefrom, subject to the payment of estate indebtedness.

It is respectfully submitted that the petition for certiorari should be denied.

GEO. P. WHITMAN,
Counsel for Respondents,

Frampton E. Ellis, as administrator de bonis non cum testamento annexo of the Estate of Joel Hurt, Sr., Deceased, et. al., and Mrs. Willie Martin Hurt.

219 HURT BUILDING
ATLANTA, GEORGIA

APPENDIX

CODE OF GEORGIA ANNOTATED.

Sec. 30-113. No verdict or judgment by default shall be taken in a suit for divorce, but the allegations in the petition shall be established by evidence before both juries.

Sec. 30-122. When a divorce shall be granted, the jury rendering the final verdict shall determine the rights and disabilities of the parties, subject to the revision of the court.

Sec. 30-211. In either of the latter two cases the husband may voluntarily, by deed, make an adequate provision for the support and maintenance of his wife, consistent with his means and her former circumstances, which shall be a bar to her right to permanent alimony.